

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
On-Brief May 25, 2004

**STATE OF TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES v.
JOHN BELDER**

**A Direct Appeal from the Juvenile Court for Carroll County
No. JC3097-01 The Honorable Larry J. Logan, Judge**

No. W2003-02888-COA-R3-PT - Filed July 9, 2004

This is a termination of parental rights case. Father appeals from the order of the Juvenile Court of Carroll County, terminating his parental rights. Specifically, Father asserts that the grounds cited for termination are not supported by clear and convincing evidence in the record, that termination is not in the best interest of the children, and that the Department of Children's Services did not provide reasonable services. Because we find clear and convincing evidence in the record to support the trial court's findings, we affirm.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Juvenile Court Affirmed

W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and DAVID R. FARMER, J., joined.

Laura A. Keeton of Huntingdon For Appellant, John Belder

Paul G. Summers, Attorney General and Reporter; Juan G. Villasenor

OPINION

John Belder ("Mr. Belder," or "Appellant") is the natural father of A.D.B. (d.o.b. 9/11/98) and J.D.B. (d.o.b. 8/06/94). J.D.B. is blind and developmentally delayed and attends the Tennessee School for the Blind in Nashville, Tennessee during the school year. Mr. Belder and the children's mother, Virginia Joy Belder ("Ms. Belder," and together with Mr. Belder, "Respondents"),¹ were divorced in the late 1990s and Ms. Belder was awarded legal custody of the children. Despite Ms. Belder having custody of the children, the children stayed with Mr. Belder.

¹ Ms. Belder does not appeal from the Order of the trial court, terminating her parental rights to A.D.B. and J.D.B.

Mr. Belder was arrested on May 10, 2001 for manufacturing methamphetamine. On May 14, 2001, the State of Tennessee Department of Children's Services ("DCS," "Petitioner," or "Appellee") received a referral about the methamphetamine raid at the home and the conditions present at the home. Patty Taylor, the CPS investigator sent to Mr. Belder's home, testified that Ms. Belder and her boyfriend were at the house,² along with A.D.B. J.D.B. was attending school in Nashville. Ms. Belder expressed her desire to keep the children and DCS furnished Ms. Belder with in-home services to accomplish that goal.

On June 28, 2001, DCS received another call about the conditions in the Belder household. Ms. Taylor testified as follows concerning this referral:

We [DCS] got another call on 6-28-01, reporting that the children were living in a trailer with no electricity and was very dirty. I [Ms. Taylor] went out and looked for them twice on the 28th, and couldn't find them. I also went to the home on the 29th, and couldn't find them. I got a phone call on July 2, 2001. It was probably around 2:00 or 3:00 o'clock in the morning when I got the call saying that Ms. Belder's boyfriend, Mr. Cunningham, had killed himself; that she was going to jail for drug paraphernalia and that there were two children in the home and that I needed to come to the scene.

Concerning the conditions in the home, Ms. Taylor testified as follows:

...Law enforcement told me [Ms. Taylor] they wanted me to go in the home; they wanted me to see the living conditions. I went into the home. We had flash lights because there wasn't any electricity. It had a smell in the home; it smelled of ether. They had already removed some of the hypodermic needles in the home before I arrived. When I got in the house, they showed me on a shelf where there were hypodermic needles; there was a mattress on the floor in the front room. In the back bedroom, there was a full and a twin-sized mattress on the floor; there was a kerosene lantern burning. And I noticed two gallon jugs by a coffee table. And I asked the law enforcement what that was, and they advised me it was meth.

The children were taken into protective custody that night and Ms. Belder was arrested and charged with possession of methamphetamine, possession of drug paraphernalia, and child abuse and/or neglect. On July 3, 2001, a "Protective Custody Order" was entered. A guardian ad litem was also appointed for the children on July 3, 2001.

² Ms. Belder told the DCS worker that she and her boyfriend were staying at Mr. Belder's home, following his arrest, to keep an eye on his personal belongings.

The children were found to be dependent and neglected at a hearing on July 31, 2001. Permanency Plans were developed for the children on July 13, 2001, with a goal of reunification. These Plans were signed by both Mr. Belder and Ms. Belder and were approved and ratified by the trial court's Order of May 9, 2002.³ Mr. Belder was released from jail in November 2001. Ms. Belder was released from jail in January 2002. On February 14, 2002, Mr. Belder was again arrested in Madison County for possession of drug paraphernalia and conspiracy to manufacture methamphetamine. He pled guilty to both charges. At the time of the hearing on this matter, on September 2, 2003, Mr. Belder was still incarcerated.

On August 26, 2002, Ms. Belder was ordered to pay \$105 per month in support for A.D.B. Support for J.D.B. was not ordered since DCS was receiving his social security benefits.

On March 18, 2003, DCS filed a "Petition to Terminate Parental Rights" of Mr. Belder and Ms. Belder to A.D.B. and J.D.B. The Petition lists the following grounds for termination:

Your Petitioner alleges the following grounds for Termination of Parental Rights, as alternatives to one another:

* * *

3. Respondent, John Belder, has willfully abandoned these children in that Respondent has willfully failed to support or to engage in more than token support for four (4) consecutive months immediately preceding incarceration.

4. Respondent, John Belder, has engaged in conduct prior to incarceration which exhibits a wanton disregard for the welfare of the children.

5. These children were found to be dependent and neglected by this Court and [were] placed in the custody of the Department of Children's Services; the Department made reasonable efforts to prevent removal or the children's situation prevented reasonable efforts from being made prior to removal; the Department has made reasonable efforts to assist the parents, John Belder and Virginia Joy Belder, to establish a suitable home for the children for a period of four (4) months following the removal, but Respondents, John Belder and Virginia Joy Belder, have made no reasonable efforts to provide

³ On September 16, 2002, the Permanency Plans for both children were revised. The revised Permanency Plans indicated a concurrent goal of return to parent and adoption. Ms. Belder signed these revised Permanency Plans on September 26, 2002 and the revised plans were ratified by the court. Mr. Belder did not sign the revised Permanency Plans.

a suitable home and have demonstrated a lack of concern for the children to such a degree that it appears unlikely that they will be able to provide a suitable home for the children at an early date.

6. The children have been removed by order of this Court for a period of six (6) months; the conditions which led to their removal still persist; other conditions persist which in all probability would cause the children to be subjected to further abuse and neglect and which, therefore, prevent the children's return to the care of Respondents, John Belder and Virginia Joy Belder; there is little likelihood that these conditions will be remedied at an early date so that [these] children can be returned to Respondents, John Belder and Virginia Joy Belder, in the near future; the continuation of the legal parent and child relationship greatly diminishes the children's chances of early integration into a stable and permanent home.

7. Despite frequent explanations of the statement of responsibilities set out in periodic foster care plans prepared for and signed by Respondents, John Belder and Virginia Joy Belder, they have failed to comply in a substantial manner with those reasonable responsibilities related to remedying the conditions which necessitate foster care placement.

8. Awarding legal and physical custody of the children to Respondents would pose a risk of substantial harm to the physical or psychological welfare of the children.

V.

It is in the best interest of the children, [A.D.B.] and [J.D.B.], and the public that this proceeding be brought, that all of the parental rights of the Respondents to these children be forever terminated, and that complete custody, control and guardianship of [A.D.B.] and [J.D.B.] be awarded to the State of Tennessee, Department of Children's Services, with the right to place them for adoption and to consent to such adoption in loco parentis.

An Answer was filed on March 28, 2003, wherein Mr. Belder asserts that he "remains in regular telephone contact with the children despite being incarcerated," that he "will be released from prison mid-2004 and fully intends to act as a responsible parent," and that he "complied as fully as possible [with the Permanency Plans] while incarcerated."

Following a hearing, on September 2, 2003, the trial court entered its “Order Terminating Parental Rights and Final Decree of Guardianship” (the “Order”), which reads, in relevant part, as follows:

...Upon proof introduced at the hearing, statements of counsel, and the entire record, the Court finds upon clear and convincing evidence that the Petition to Terminate Parental Rights filed by the State of Tennessee, Department of Children’s Services, is well taken as to Respondents, John Belder and Virginia Joy Belder, and should be sustained and relief granted thereunder for the causes therein stated:

* * *

2. Respondent, John Belder, has engaged in conduct prior to incarceration which exhibits a wanton disregard for the welfare of the children.

3. The children have been removed by order of this Court for a period of over six (6) months; the conditions which led to their removal still persist; other conditions persist which in all probability would cause the children to be subjected to further abuse and neglect and which, therefore, prevent the children’s return to the care of the Respondents, John Belder and Virginia Joy Belder; there is little likelihood that these conditions will be remedied at an early date so that these children can be returned to Respondents, John Belder and Virginia Joy Belder, in the near future; and the continuation of the legal parent and child relationship greatly diminishes the children’s chances of early integration into a stable and permanent home.

* * *

5. The Court further finds that the children have been exposed to methamphetamine labs and methamphetamines by both parents.

6. That it is by clear and convincing evidence that it is in the best interest of the children, [A.D.B.] and [J.D.B.], that the parental rights of John Belder and Virginia Joy Belder to the children be forever terminated; in particular, that the parents have failed to make such [an] adjustment of circumstance, conduct or conditions as to make it safe and in the children’s best interest to be in the home of the parents; that the parents have failed to make a lasting adjustment after reasonable efforts have been made...and that the complete custody, control, and guardianship of the children be awarded to the State of Tennessee, Department of Children’s Services, with the right to place

the children for adoption and to consent to such adoption in loco parentis.

7. That the Department of Children's Services has exercised reasonable efforts to prevent removal and reunify the family including providing drug screening, counseling, parenting, homemaker services, and alcohol and drug services.

* * *

9. That a transcript of the findings of fact and conclusions of law by the Court shall be incorporated by reference and shall be as if set forth verbatim.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED:

* * *

2. That all parental rights of John Belder and Virginia Joy Belder, to the children, [A.D.B.] and [J.D.B.], are hereby forever terminated....

John Belder appeals from this Order and raises three issues for review as stated in his brief:

1. Did the Department of Children's Services prove by clear and convincing evidence the grounds for removal?
2. Is it in the best interest of the children to terminate the parental rights?
3. Did the Department provide reasonable services to the father?

Since this case was tried by the court sitting without a jury, we review the case *de novo* upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm, absent error of law. *See* Tenn. R. App. P. 13(d).

Termination of Parental Rights

T.C.A. § 36-1-113(c)(Supp. 2003) governs termination of parental rights and requires that such termination be based upon:

- (1) A finding by the court by clear and convincing evidence that the grounds for termination [of] parental or guardianship rights have been established; and
- (2) That termination of the parent's or guardian's rights is in the best interest of the child.

The trial court terminated Mr. Belder's parental rights on the following grounds, which are found at T.C.A. § 36-1-113(g)(Supp.2003):

- (3)(A) The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:
 - (I) The conditions which led to the child's removal or other conditions which in all reasonable probability would cause the child to be subjected to further abuse or neglect and which, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s), still persist;
 - (ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and
 - (iii) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home.

T.C.A. § 36-1-113(c) allows for termination of parental rights if any one of the grounds outlined in T.C.A. § 36-1-113(g) is found by clear and convincing evidence, and termination is in the best interest of the child. We have reviewed the entire record in this case and we find that the record supports the trial court's finding that termination of Mr. Belder's parental rights is warranted on grounds found at T.C.A. § 36-1-113(g)(3)(A). We further find, in accordance with the trial court, that termination of Mr. Belder's parental rights is in the best interest of these children.

In its findings of fact and conclusions of law from the bench, which were incorporated by reference into the Order, the trial court makes the following, relevant, statements concerning the termination of Mr. Belder's parental rights:

In Mr. Belder's case, I find that at least one of the conditions for terminations exists, one of the grounds, and that is, he's now incarcerated. But preceding his incarceration, he knowingly exposed both children or one child—excuse me—one child to conduct which exhibited a wanton disregard for the welfare of the child.

At least one of the children and possibly both have had repeated exposures to methamphetamine labs and methamphetamines. And all I can do is go by past history when I look as to whether there will be a persistence of these conditions.

Mr. Belder has been in jail or has been convicted of selling marijuana; he was convicted of manufacturing methamphetamine here in Carroll County; three months after he was released he was convicted of conspiracy to manufacture methamphetamine in Madison County which also violated his probation here in Carroll County. He's now incarcerated.

* * *

...When Mr. Belder was not incarcerated, the children were exposed or the one child was exposed to that [methamphetamine] lab.... So the Court takes very seriously the threat of methamphetamine labs. And the use of methamphetamine extremely hazardous situation, extremely dangerous drug, would cause extreme harm to the children (sic).

* * *

...I can only assume by past history that Mr. Belder is going to—when he gets out—he's always dealt in drugs, he's going to continue to deal in drugs, and these kids have been exposed to drug dealers all their lives.

The child [J.D.B.] is multi-handicapped, and these people to me don't have a clue how to deal with this child....

I think this child [J.D.B.] is greatly at risk, more so than the other even, if there are drug dealers around because the child is blind and has other handicaps. And the fact that the instability exists is contributing also to the detriment of [J.D.B.].

Now, the second issue is whether it's in the best interest of the children to terminate the parental rights. The factors that are to be looked at, whether the parent or guardian has made an adjustment of circumstance, conduct or condition, as to make it safe and in the child's best interest to be in the home of the parent or guardian.

Of course, Mr. Belder cannot do that because he's in the penitentiary and I have no reason to believe he will be anywhere else for most of the rest of his life.

* * *

Whether the parent or guardian has failed to make a lasting adjustment after reasonable efforts by social services; there's definitely been reasonable efforts. Ms. Prater has testified and Ms. Taylor both have testified of numerous efforts....

Whether a meaningful relationship has been established between the parent and the child; I think probably there is some relationship, how meaningful, I don't know.

Whether the parent or guardian has paid child support consistent with the child support guidelines....I can't say that Mr. Belder has willfully failed to pay because he's been in jail the whole time. But I think the grounds that I previously stated do exist for him.

So the Court finds by clear and convincing evidence that one or more grounds exist in the case of each child and in the case of each parent and termination of parental rights for each parent is in the best interest of each child.

And I also find that Ms. Belder and Mr. Belder have been advised of the possibility of termination at each staffing....

Mr. Belder's parental rights to these children were terminated based upon persistence of conditions and little likelihood that the conditions would be remedied at an early date. *See* T.C.A. § 36-1-113(g)(3)(A). The record reflects that Mr. Belder supported his children prior to his initial arrest on May 10, 2001, that he was able to hold a job, and maintain a home at that time. The record also reflects that Mr. Belder has attempted to maintain contact with these children during his incarceration.

The record also indicates that J.D.B. is a special needs child, and that stability is very important to his continued improvement. Kelly Benton, J.D.B.'s teacher at Nashville School for the Blind, testified, in relevant part, as follows:

Q. What effect would a change of placement or situation have on [J.D.B.]?

A. I [Ms. Benton] don't think it would be very good. I mean, he's—he's very—and he's used to his routine and his—to change—I mean, he just takes change very difficult (sic), it's very hard—hard on him. And I think for him to—you know, keep in school and be successful in school, he's got to have a stable home.

The record indicates that, since Mr. Belder became involved in drugs (or at least since his initial arrest for manufacturing methamphetamine), Mr. Belder has been unable to provide the stability needed for these children, especially J.D.B. During the three months that Mr. Belder was out of jail, between his first incarceration and his current incarceration, he testified that he was unable to secure employment and that he was living at the Motor Inn in McKenzie, Tennessee. Although he was making an effort at that time, he ended up returning to drug dealing, to wit:

Q. Were you [Mr. Belder] trying to make an effort in those three months you were out of jail—

A. Yes, ma'am.

Q. —to turn your life around?

A. I was. But I didn't have no help and it was hard. And I had a—You know, I had to make a living somehow and I got back into, you know, dealing crank and—and was just trying to make enough to live on.

The evidence in record, specifically Mr. Belder's own testimony, indicates that the conditions that led to his return to drug dealing (e.g. no job, no home, no support), after he was released from jail the first time, will face him again when he is released from his second incarceration, to wit:

Q: Whenever you do get out of prison, do you have a home to go to?

A: No, ma'am. I'm probably going to a half-way house, you know, so they can try to help me find a job. It's either going to be in Jackson or Nashville....

* * *

Q: How about when you get out of prison? What are your plans?

A: If I have my kids, you know, here, I'm going to go to a half-way house here in either Jackson or Nashville; you know, that way I can, you know, get a job and, you know, then get my own place...

The record in this case supports the trial court's Findings of Fact as set out above. These children have been in State custody since June 28, 2001. Mr. Belder has been separated from these children since his first arrest on May 10, 2001. The record reflects that Mr. Belder, even in the face of losing his children, broke his parole, returned to selling drugs, and was incarcerated for a second time. As discussed *supra*, the circumstances that led to the children's removal from Mr. Belder's custody still persist. Furthermore, from the record, it does not appear that Mr. Belder's situation will automatically be remedied upon his release from prison or at any time in the foreseeable future. Under T.C.A. § 36-1-113(g) and for the foregoing reasons, we find that the continuation of the parent and child relationship greatly diminishes these children's chances for early integration into a safe, stable and permanent home.

Best Interest

T.C.A. § 36-1-113(i) (Supp. 2003) reads, in relevant part, as follows:

(i) In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;

* * *

- (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

* * *

- (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

The listed factors are not exhaustive. The statute does not require every factor to appear before a court can find that termination is in a child's best interest. The trial court held that termination of Mr. Belder's parental rights was in the children's best interest pursuant to most of the statutory factors. Specifically, the trial court found that Mr. Belder had failed to make a lasting adjustment in his circumstances after reasonable efforts by social service providers. *See* T.C.A. §§ 36-1-113(i)(1) and (2). The records shows that the conditions which led to his re-entry into drug dealing after his first incarceration will face him again upon his release from prison. Based upon his past recidivism, and the challenges that await him upon release, it does not appear that Mr. Belder will be able to effect a lasting change of his conditions such that it would

be in these children's best interest to place them with Mr. Belder. Furthermore, because he has been incarcerated, Mr. Belder has been unable to support these children, or to exercise meaningful visitation and/or contact with them. Consequently, the trial court found, under the statute, that Mr. Belder had failed to develop a meaningful relationship with the children. T.C.A. §§ 36-1-113(i)(3) and (4). The proof is also clear that Mr. Belder cannot presently provide a safe and secure home, T.C.A. § 36-1-113(I)(7), and that he has paid little or no support. T.C.A. § 36-1-113(I)(9). Furthermore, the uncontested testimony is that J.D.B. is a special needs child. Testimony in record also indicates that, due to his blindness, J.D.B.'s condition is exacerbated by instability. The proof is clear that a change in caretakers would be traumatic, especially to J.D.B. T.C.A. § 36-1-113(i)(5).

For all of these reasons, we find that the record supports, by clear and convincing evidence, the trial court's finding that termination of Mr. Belder's parental rights is in the best interest of these children.

Reasonable Efforts

Under T.C.A. § 37-1-166(a) (2001), the court is required to determine whether DCS made "reasonable efforts" for reunification of the family. T.C.A. § 37-1-166(g)(1) defines "reasonable efforts" as follows:

As used in this section, "reasonable efforts" means the exercise of reasonable care and diligence by the department to provide services related to meeting the needs of the child and the family. In determining reasonable efforts to be made with respect to the child, as described in this subdivision, and in making such reasonable efforts, the child's health and safety shall be the paramount concern.

The record in this case contains clear and convincing evidence that DCS has made reasonable efforts to help Mr. Belder keep his family together. Reunification of a family is a two-way street, and the law does not require DCS to carry the entire burden of this goal. The record indicates that Mr. Belder participated in the drafting of the original Permanency Plans, and that he understood the requirements placed upon him by those Plans. Terry Prater, the DCS case manager, testified as follows concerning DCS's efforts and Mr. Belder's compliance with the Plans:

Q: When Mr. Belder was out of jail, did you talk with him about the plan and what things were asked of him?

A Yeah. He and I discussed several times because he had been in jail and hadn't been able to get a job about what services—He didn't have transportation and that kind of thing, and at the time, we didn't have any funds available to pay for the programs for him.

We discussed several times certain options, programs that might be free, programs like Carl Perkins Center. They have services that they can—programs that they can use that are free of charge to a client.

Q: Do you know if he accessed any of those services?

A: To my knowledge, he did not.

Q: Did he ever provide any documentation of compliance—

A. No.

Q: —with the plan? Do you know why he was unable to comply?

A: Well, he got out of jail in Carroll County in December, and then was arrested again in Madison County in February. So he's been in jail and not able to—to do any of the programs or things in the plan.

Additionally, DCS has allowed visitation with the children, except when Mr. Belder was incarcerated. Within the confines of its own resources and the specific circumstances of this case, it is the opinion of this Court that DCS has made reasonable efforts to help Mr. Belder meet the requirements of the Permanency Plans. Unfortunately, Mr. Belder, by virtue of his incarceration and other circumstances, has been unable to reciprocate in the process of reunification.

For the foregoing reasons, we affirm the Order of the juvenile court, terminating the parental rights of John Belder. Costs of this appeal are assessed to the Appellant, John Belder, and his surety.

**W. FRANK CRAWFORD, PRESIDING
JUDGE, W.S.**